LEGAL CONSEQUENCES OF FIDUCIARY AGREEMENT MADE UNILATEDLY BY THE FINANCING INSTITUTION WITHOUT THE PRESENCE OF CONSUMER IN FRONT OF NOTARY

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ABSTRACT

This research is entitled "Legal Consequences of Fiduciary Agreements Made Unilaterally by Financing Institutions Without the Presence of Consumer in front of Notary." The problem found in this research is the basis for granting a power of attorney from consumers to financial institutions, due to a lack of understanding from the public regarding fiduciary agreements, the situation This is often used by financial institutions to make unilateral fiduciary agreements and not involve consumers so that problems often arise in the future, including firstly, settlements in cases of default/broken promises occur outside of court by means of intimidation, violence and even ending in criminal charges. The second consequence of consumers not understanding about Fiduciary Guarantee Agreements is that there are losses due to unilateral decisions without involving second parties and third parties, in this case the court. Based on the background of the problems described above, the author formulates the problem as follows: What is the process of forming a fiduciary agreement? made unilaterally by a financing institution without the presence of the consumer before a notary? and What are the legal consequences of a fiduciary agreement made unilaterally by a financing institution without the presence of the consumer in front of a notary? This research study uses empirical legal research, namely a legal research method that uses empirical facts that involve lots of interviewing names, sources and data. Support is presented to complement the facts/interviews conducted through direct observation. This research uses several theoretical bases including: Agreement Theory, Legal Certainty Theory, Legal Protection Theory and Justice Theory. Agreement Theory and Legal Certainty Theory are used to discuss the first problem formulation, and Legal Protection Theory and Justice Theory are used to discuss the second problem formulation. A Fiduciary Agreement is a follow-up agreement to a main agreement (accessoir) which requires the parties to carry out an achievement, which contains rights and obligations so that it is mandatory for the parties to sign the agreement and not be represented by just one party.

Keywords: *Fiduciary Agreement, Consumers, Financing institutions*

1. INTRODUCTION

The banking world recognizes the existence of a guarantee institution that is based on trust, namely Fiduciaire Eigendoms Overdracht (FEO), known/abbreviated as fiduciary. This guarantee institution was previously not specifically regulated in statutory regulations, but since September, 30 1999 the government has promulgated Law Number 42 of 1999 concerning Fiduciary Guarantees. This

guarantee institution is known as fiducia cum creditore contracia, which means a promise in the form of trust made with a creditor, that the creditor will transfer ownership of an object to the debtor as collateral for the debt with an agreement that the creditor will transfer ownership back to the debtor when the debt is settled paid off.

The fiduciary cum creditore who gives the fiduciary remains in control of the fiduciary object, so that the fiduciary can use the object. The fiduciary institution as known in the form of Fiduciary Eigendoms Overdracht (FEO) is the transfer of property rights in trust, this arises in connection with the provisions in Article 1152 paragraph (2) of the Civil Code concerning pawning which requires that power over the object being pawned must not be vested in pledgor. This prohibition means that the pledger cannot use the pledge collateral. This gives rise to several legal problems and collateral for objects pawned for business purposes.

Article 1 of Law Number 42 of 1999 concerning fiduciary is "The transfer of ownership rights to an object on the basis of trust with the stipulation that the object whose ownership rights are transferred remains in the control of the owner of the object", while fiduciary guarantee is "security rights over movable objects, both tangible and which are intangible and immovable, especially buildings which cannot be encumbered with mortgage rights as intended in the Law. No. 4 of 1996 concerning mortgage rights, which remain in the control of the fiduciary, as collateral for the repayment of certain debts, which gives the fiduciary recipient a preferred position over other creditors." Because fiduciary guarantees give the right to the party giving the fiduciary to remain in control of the object that is the object of the fiduciary guarantee based on trust, the registration system regulated in this law can provide guarantees to the party receiving the fiduciary and parties who have an interest in the object. The imposition of fiduciary guarantees is regulated in Articles 4 to 10 of Law Number 42 of 1999 concerning fiduciary guarantees. In article 4 of Law Number 42 of 1999 concerning fiduciary guarantees, it is stated that: "A fiduciary guarantee is a subsidiary agreement to a main agreement which creates an obligation for the parties to fulfill an achievement."

Furthermore, in article 5 it is stated: paragraph "(1) The encumbrance of objects with fiduciary guarantees is made with a notarial deed in Indonesian and is a fiduciary guarantee deed; "Furthermore, paragraph (2) states that making a fiduciary guarantee deed as intended in paragraph (1) is subject to a fee, the amount of which is further regulated by Government Regulation." From the two articles above, it is known that in a fiduciary guarantee, after a main agreement there is an agreement which follows as a subsidiary agreement in the form of a guarantee agreement which creates an obligation for the parties to fulfill an achievement, then the agreement is stated in a deed which is referred to as the Deed. Fiduciary Guarantee or referred to as Fiduciary Guarantee Imposition.

Initially there was a problem regarding the imposition of fiduciary guarantees where business actors (financing institutions) as fiduciary recipients and fiduciary givers (consumers) never signed a fiduciary agreement (Fiduciary deed) together in front of a Notary, so that the resulting fiduciary agreement was legally weak, the financing agreement (basic agreement) which has been agreed upon and signed jointly between the business actor and the consumer is followed by the signing of a fiduciary agreement (fiduciary deed) in front of a Notary, but what happens is that the consumer is never presented before the Notary to sign the fiduciary agreement, so that the resulting fiduciary agreement becomes legally defective if legally tested, it does not have an element of deed authenticity.

Prohibition for business actors from carrying out unilateral legal relations with consumer fiduciary collateral objects which are still paid in installments. Based on article 18 point 1 d, Law No. 8 of 1999 concerning Consumer Protection, it is stated that: "Business actors are prohibited from declaring the granting of authority from

consumers to business actors, either directly or indirectly, to carry out unilateral actions relating to goods purchased by consumers in installments".

OJK Regulation No 1/ POJK.07/ 2013 Concerning Consumer Protection in the Financial Services Sector Article 22 Point 3 C "States the granting of authority from consumers to financial services business actors, either directly or indirectly, to carry out all unilateral actions on goods pledged as collateral by consumers, unless such unilateral action is carried out based on statutory regulations."

Based on the problems above, the researcher is interested in raising this problem in scientific writing with the title "Legal Consequences of Fiduciary Agreements Made Unilaterally by Financing Institutions Without the Presence of Consumers in the Presence of a Notary." unilaterally by a financing institution without the presence of the consumer before a notary and what are the legal consequences of a fiduciary agreement made unilaterally by a financing institution without the presence of the consumer before a notary. The specific objectives of this research are to examine and analyze the process of forming fiduciary agreements made unilaterally by financial institutions without the presence of consumers in front of a notary and to analyze the legal consequences of fiduciary agreements made unilaterally by financial institutions without the presence of consumers in front of a notary. , as well as seeking solutions to legal rules based on positive law. The legal basis for this research is that researchers use Agreement Theory, Legal Certainty Theory, Justice Theory and Legal Protection Theory.

2. RESEARCH METODOLOGY

This type of research uses empirical legal research, namely examining the problems faced from a legal perspective by conducting research that focuses on its empirical nature, namely direct field studies, the main data sources are the results of interviews and observations. This research is descriptive in nature, where this research describes a symptom, event that is occurring now or in the future related to the title of the research. The data sources that are the source of Primary data information are data obtained directly from the results of field research, namely Finance, consumers and notaries. Secondary data is data obtained through literature study, namely Financing Agreements, Fiduciary Agreements and fiduciary certificates as well as primary legal materials related to this research, namely the 1945 Constitution, Law No: 8 of 1999 concerning Consumer Protection, Laws No: 42 of 1999 concerning Fiduciary Guarantees, Law No: 10 of 1998 concerning Banking, Law No: 2 of 2014 concerning Amendments to Law No: 30 of 2004 concerning Notary Positions, Regulation of the Minister of Finance of the Republic of Indonesia No: 130/ PMK.010/2012 concerning registration of fiduciary guarantees for financing companies that carry out consumer financing for motor vehicles with fiduciary guarantees and POJK No: 1/POJK.07/ 2013 concerning consumer protection in the financial services sector and secondary law obtained from books, papers and articles from the internet related to research.

3. RELATED RESEARCH/LITERATUR REVIEW

This research uses several books that are references in studying and exploring the problem, in addition to books, this research also uses several journals that are relevant to the topic of discussion, which contains juridical studies that refer to or in accordance with the topic of discussion.

4. RESULTS AND DISCUSSION

Process of Fiduciary Agreement Made Unilaterally by a Financing Institution without the Presence of Consumer in front of Notary

Regarding the form of the fiduciary agreement, it is not binding either verbally or in writing, but in practice it is required to be in writing. From the provisions of law and jurisprudence there are no provisions that regulate the form of a fiduciary agreement, however since the enactment of Law No. 42 of 1999 concerning fiduciary guarantees it has been regulated in article 5 paragraph 1 which states "The encumbrance of objects with fiduciary guarantees is made by notarial deed in Bahasa Indonesia and is a fiduciary guarantee deed" so that with the enactment of the fiduciary law, fiduciary agreements are required to be in writing so that they can provide legal certainty and benefit the parties who make them.

Based on the author's research, fiduciary agreements are made unilaterally by financing institutions only based on a power of attorney under the hand of the fiduciary giver (consumer) to the fiduciary recipient (business actor), for this reason the fiduciary recipient processes the fiduciary agreement at a notary by attaching the parties' financing agreement and a letter. power of attorney under the hand of the fiduciary giver to the fiduciary recipient to represent the interests of the fiduciary giver, including signing a fiduciary deed, this is contrary to Law No. 42 of 1999 concerning Guarantees, especially article 13, that "Applications for registration of fiduciary guarantees are made by the fiduciary recipient or his proxy or representative. "Just registering fiduciary guarantees with the fiduciary office, there are limits on power.

Power of attorney used by business actors is generally regulated in the Civil Code article 1792, but according to Salim HS it still has weaknesses from a sociological perspective. It can be understood that there are regulations regarding the granting of power in a fiduciary agreement that are not in accordance with or contrary to the third condition of the validity of the agreement, namely regarding "a certain thing". This was also emphasized by Gatot Supramono that "the arrangement of power of attorney agreements in fiduciary agreements is not in line with the principle of making agreements in article 1320 of the Civil Code regarding "certain matters" because the object of the fiduciary agreement turns out to be promising things that are outside the scope of fiduciary agreements." 13 of Law No. 42 of 1999 concerning fiduciary guarantees, where the power is limited to the fiduciary recipient registering the fiduciary guarantee with the fiduciary office for the purpose of obtaining a fiduciary certificate.

Regulations regarding the prohibition of power of attorney are regulated in Law No. 8 of 1999 concerning consumer protection Article 18 paragraph 1 d which states that "the granting of power from consumers to business actors, either directly or indirectly, to carry out all unilateral actions relating to goods purchased by consumers in installments". Likewise, the prohibition for business actors relates to power of attorney letters from consumers to business actors as regulated in POJK No: 1/ POJK.7/ 2013 concerning consumer protection in the financial services sector, article 22 paragraph 3 C. prohibition for business actors, which states that " granting authority from consumers to business actors, either directly or indirectly, to carry out all unilateral actions on goods pledged by consumers, unless such unilateral actions are carried out based on statutory regulations."

Regulations regarding the imposition of Fiduciary Guarantee are regulated in Article 5 paragraph (1) of Law No. 42 of 1999 concerning fiduciary guarantees which states that "the imposition of objects with Fiduciary Guarantee is made by notarial deed in Indonesian and is a Fiduciary Guarantee deed". An authentic deed is theoretically a letter or deed that was deliberately and officially made from the beginning as proof if

one day a dispute occurs. Authentic deeds are regulated in the Civil Code Article 1868, namely deeds whose form is determined by law and made by or before an official authorized to make the deed. .

The theory of agreement according to Salim H.S is "Agreement is a legal relationship between one legal subject and another legal subject in the field of property, one legal subject has the right to performance and the other legal subject is also obliged to carry out its performance. To provide legal certainty for the parties, according to Sudikno Martokusumo, legal certainty is a guarantee that requires efforts to regulate law in legislation that has been made by the authorities or those in power, these rules have a juridical aspect that can guarantee legal certainty and can be implemented as a rule or norm that must be obeyed. Based on this description, a fiduciary agreement that is notarized but is not attended by one of the parties, the procedure for executing fiduciary guarantees can only be carried out through a decree of execution from the court to provide legal certainty for the parties.

Legal Consequences of a Fiduciary Agreement made unilaterally by a Financing Institution without the Presence of the Consumer in front of Notary

As a result of the public's lack of understanding about fiduciary agreements, this situation is often exploited by financial institutions to make unilateral fiduciary agreements and not involve consumers so that problems often arise in the future, including first, settlement in cases of default/broken promises occurs outside the court by means of intimidation, Violence even ends in crime.

The second consequence of consumers not understanding about Fiduciary Guarantee Agreements is that there are losses resulting from unilateral decisions without involving second parties and third parties, in this case the courts, both civil in nature. From the description of the problem above, the legal consequences that can arise if a fiduciary agreement made unilaterally by a financing institution is invalid for the parties (does not have executorial rights), based on the Decision of the Constitutional Court of the Republic of Indonesia No. 18 / PUU-XVIII/2019, on 6 January 2020, that to provide legal certainty "Execution of fiduciary guarantees must go through a Court mechanism, if the debtor does not hand over fiduciary guarantees voluntarily" according to the Constitutional Court that, article 15 paragraph 2 of Law No. 42 of 1999 concerning Fiduciary Guarantees, that the phrase "Executorial power" and the phrase "the same as a court decision that has obtained permanent legal force" is contrary to the 1945 Constitution and has no permanent legal force, according to the Constitutional Court that currently creditors cannot sell fiduciary collateral objects unilaterally to fulfill their debt obligations, but there must be an agreement between creditors and debtors. Creditors can also sell the collateral object on the basis of a court decision, which states that the debtor has defaulted. Here it can be seen that the Constitutional Court's decision aims to equalize the position of creditors and debtors.

Based on the author's research, with the prevalence of unilateral fiduciary agreements by financial institutions reviewed legally based on the Decision of the Constitutional Court of the Republic of Indonesia, No. 18 / PUU-XVIII/2019, on January 6 2020, the parties will experience losses as follows:

a) Losses for consumers.

1. If the consumer is in default, then the consumer is deemed by the financing institution to have bad faith and to control the object of fiduciary collateral unlawfully, this can be qualified by the financing institution as a criminal act of embezzlement in accordance with Article 372 of the Criminal Code and then the financing institution reports the consumer on the basis of a criminal act embezzlement.

2. Consumers are bound by clauses in the fiduciary deed that they never knew about which could result in harm to them, for example in relation to the process of confiscating fiduciary collateral by the financing institution unilaterally.

b) Loss for financing institutions.

1. Financing institutions do not have 'droit de suite' rights (a right that follows from the owner of the object/the right that follows from the object in the hands of anyone) and 'preferential rights (priority rights) and do not have a clear legal basis for executing fiduciary guarantees in accordance with article 15 of Law No. 42 of 1999 concerning fiduciary guarantees, it must go through a court mechanism because there is no executorial title in fiduciary agreements made unilaterally.
2. Underhand execution of fiduciary collateral objects is a criminal offense under Article 368 of the Criminal Code (if the financing institution uses coercion and threatens confiscation). The provisions of article 365 paragraphs two, three and four of the Criminal Code also apply to this action if the financing institution uses another party to forcefully take fiduciary guarantees from consumers.

Examining the decision of the Constitutional Court of the Republic of Indonesia No. 18 / PUU- Referring to the theory of justice according to Thomas Hubbes who stated that the definition of justice is an action that is said to be fair if it is based on an agreement that has been agreed, then the responsibility of the financing institution in entering into a fiduciary agreement refers to article 5 paragraph 1 of Law No. 42 of 1999 concerning fiduciary guarantees so that provide legal protection for parties in the future, both financial institutions and consumers.

5. CONCLUSION

The process of forming a fiduciary agreement made unilaterally by a financing institution without the presence of the consumer before a notary is that the formation of a fiduciary agreement made unilaterally by a financing institution is based on a power of attorney under the hand of the fiduciary giver to the fiduciary recipient, to make a fiduciary deed, in the formation The consumer Fiduciary Agreement needs to be presented before a notary because the agreement made is a follow-up agreement to a main agreement (accessoir) and does not provide legal protection for the party giving the fiduciary for that reason. from the fiduciary giver to the fiduciary recipient to represent the interests of the fiduciary giver, including signing a fiduciary deed, this is contrary to Law No. 42 of 1999 concerning Fiduciary Guarantees, article 13 where it is emphasized that the power of the fiduciary giver to the fiduciary recipient is only limited to registering fiduciary guarantees with the fiduciary office.

The legal consequences of a fiduciary agreement made unilaterally by a financial institution without the presence of the consumer before a notary is that the loss for the consumer is: If the consumer defaults, then the consumer is deemed to have bad faith in unlawfully controlling the object of the fiduciary guarantee, for the debtor is bound to For example, clauses that are detrimental to him relate to the process of confiscating goods unilaterally by the financing institution. Meanwhile, the disadvantage for financing institutions is that financing institutions do not have 'droit de suite' and 'preference rights' and do not have a clear legal basis for carrying out execution because there is no executorial title in fiduciary agreements made unilaterally, not in accordance with article 15 of the law. Law No. 42 of 1999 concerning Fiduciary Guarantees, the execution of fiduciary guarantees must go through the court.

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